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No. 10-481

Supreme Court, U.S.
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In The

Supreme Court of the United States

FORD MOTOR CREDIT COMPANY,
Petitioner,

v.

DEPARTMENT OF TREASURY, TREASURER FOR THE DEPARTMENT OF TREASURY, AND STATE OF MICHIGAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Should this Court grant certiorari to review the decision of a Michigan court that affirmed a curative statutory amendment, where the amendment did not retroactively change the law?

II. Should this Court grant certiorari to clarify when a State may retroactively change its tax law in a case where no retroactive change in tax law occurred, and where the only retroactive change sought was by a taxpayer who sought to retroactively apply an incorrect court decision in order to request a refund of sales tax?

PARTIES TO THE PROCEEDING

Petitioner is Ford Motor Credit Company. Respondents are Department of Treasury, Treasurer for the Department of Treasury, and State of Michigan.

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The Department of Treasury, Treasurer for the Department of Treasury, and State of Michigan ("State of Michigan" or "Treasury") accept Ford Motor Credit Company's ("Ford") statement of the opinions below.

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). The decision of the Michigan Court of Appeals below, however, was based on independent and adequate grounds under State law. Consequently, this Court lacks jurisdiction.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The statute at issue in this case is Mich. Comp. Laws § 205.54i. Pet. App. 15-24.

INTRODUCTION

The question presented by the Petitioner did not form the basis for the decision by the State court below.

The State court resolved the issue by concluding that the Michigan Legislature provided a legislative correction to the proper understanding of the original act – it did not retroactively apply a revised statute. Thus, this case was resolved on independent and adequate State grounds, and review by this Court is not warranted.

Here, the Michigan Legislature amended the General Sales Tax Act, Mich. Comp. Laws § 205.51 *et. seq.* (G.S.T.A.), following a decision from the Michigan Court of Appeals that – contrary to legislative intent – extended "bad debt" sales-tax deductions to automobile finance companies.

After the Michigan Legislature amended the G.S.T.A. to give effect to its original intent, the Michigan Court of Appeals decided that Ford was not entitled to the tax deduction because the statute – once clarified by the Legislature – was a matter of interpretation of the original act. As such, the case presents only the Michigan Legislature's correction of the State judiciary's misinterpretation of State law – not the case of a retroactive application of a statutory amendment. Accordingly, the State court decision from which Petitioner seeks review does not implicate this Court's retroactive application analysis as expressed in *United States v. Carlton*.[1]

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[1] *United States v. Carlton*, 512 U.S. 26 (1994).

The case would also be a poor vehicle to address this Court's retroactivity jurisprudence, since the Michigan Court of Appeals did not decide the case on that basis. And the case is strangely postured because Ford never relied on the prior understanding of the statutory scheme. Ford had already filed its tax returns and sought to change the tax treatment it had claimed in those past years. Ford is therefore in effect retroactively seeking a refund – a refund it did not believe it was entitled to at the time the returns were filed. It is not a case where Ford faced new tax liabilities long after the corresponding tax period ended.

Finally, contrary to Ford's claim, there is no need for this Court to revisit its opinion in *Carlton*. Even if this Court were to review this issue as a retroactive change to Michigan's tax law, Michigan's legislative change meets constitutional standards established by *Carlton*.

STATEMENT OF THE CASE

A. The nature of the dispute.

This case is a dispute over the power, under Michigan law, of the Michigan Legislature to clarify the circumstances under which "bad debt" deductions may be claimed under Michigan's General Sales Tax Act, Mich. Comp. Laws § 205.51 *et. seq.*, following a decision of the Michigan Court of Appeals that created confusion on the subject.

In 2006, in *DaimlerChrysler Services N.A., LLC v. Dep't of Treasury*, the Michigan Court of Appeals extended eligibility for "bad debt" sales-tax deductions to automobile finance companies.[2] The automobile finance companies were not legally liable for paying sales tax and did not themselves remit sales tax payments. Rather, they merely provided financing for automobile purchases, for which financing incidentally included reimbursement to dealers for sales tax paid by the dealers. Only months after the decision became final, on October 1, 2007, the Michigan Legislature clarified the meaning of the statute. The Legislature was careful to state that it was "expressing the original intent of the Legislature," and that the act was "curative," meant to correct the misinterpretation of the bad-debt statute of the Michigan Court of Appeals in *DaimlerChrysler*. Pet. App. 21-22.

Ford challenged the statutory amendment, and the Michigan Court of Appeals ultimately upheld the statutory amendment. Pet. App. 1, 43.

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[2] *DaimlerChrysler Services N.A., LLC v. Dep't of Treasury*, 271 Mich. App. 625; 723 N.W.2d 569 (2006).

B. Michigan sales tax statute governing the bad-debt deduction.

The curative amendment to the statute dealt with the definition of "taxpayer." The 2007 amendment added a definition of "taxpayer" in Mich. Comp. Laws § 205.54i(1)(e) that makes clear that the entity entitled to the deduction is the taxpayer who is responsible for paying the tax on the sale. The amendment provides that, for periods prior to September 30, 2009, "taxpayer" does not include finance companies, such as Ford, here. The enacting language of the statutory amendment makes clear that Treasury's longstanding application of the previous statute was consistent with this clarifying definition, and that the Michigan Court of Appeals erred in 2006 when it decided that a finance company was entitled to the deduction.

C. Ford's business and its refund claims.

Ford is an automobile financing company. In each year at issue, Ford provided financing for motor vehicle purchases by consumers from dealers in Michigan, under retail installment sales contracts. Ford paid the dealers the entire contract price, including the money the dealers owed for sales tax. In turn, Ford received a security interest in the vehicles, including the right to repossess in case of default.

Sales tax owed on the vehicles was remitted to the Michigan Department of Treasury by the automobile dealers – not by Ford. Subsequently, some of the motor vehicle purchasers defaulted on the payment contracts. Ford filed refund claims with the

Department of Treasury under Mich. Comp. Laws § 205.54i on December 16, 2006, December 28, 2007, and April 21, 2008, for tax periods April 1, 2002 through May 31, 2006; April 1, 2006 through December 28, 2007; and April 1, 2002 through March 31, 2006, respectively. Ford claimed that, as lenders with uncollectible debts, they were entitled to a "bad debt" deduction under the Act. Treasury denied the claims because Ford was not the taxpayer legally responsible to pay the sales tax, and, therefore, was not entitled to a refund under the language of the statute, as amended.

D. The *DaimlerChrysler* decision and the Michigan Legislature's correction.

Several years before Ford filed its refund claims, DaimlerChrysler claimed a bad-debt deduction on the same basis Ford is now claiming. DaimlerChrysler's claim was denied by Treasury on the ground that the finance company was not the taxpayer responsible for the tax and had not remitted the sales tax to Treasury. DaimlerChrysler challenged the denial of its refund claim in court.

In July 2006, the Michigan Court of Appeals, in *DaimlerChrysler Services North America, L.L.C. v. Dep't of Treasury* decided in favor of DaimlerChrysler, holding that lenders act as a unit along with the dealers, and are therefore entitled to the bad-debt deduction.[3] In March 2007, the Michigan Supreme

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[3] *DaimlerChrysler*, 271 Mich. App. 625; 723 N.W.2d 569.

Court denied Treasury's application for leave to appeal the *DaimlerChrysler* decision.[4]

Five months later, in August 2007, the Michigan Legislature began considering a bill to correct the *DaimlerChrysler* Court's misinterpretation of the statute. The Michigan Legislature amended the statute on October 1, 2007, by 2007 P.A. 105, clarifying its original meaning that only those taxpayers required to remit the tax could claim the deduction, and correcting the contrary judicial interpretation of the statute:

> Enacting section 1. This amendatory act is curative and shall be retroactively applied, expressing the original intent of the [L]egislature that a deduction for a bad debt for a taxpayer under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, is available exclusively to those persons with the legal liability to remit the tax on the specific sale at retail for which the bad debt deduction is recognized for federal income tax purposes, and correcting any misinterpretation of the meaning of the term "taxpayer" that may have been caused by the Michigan [C]ourt of [A]ppeals decision in Daimler Chrysler [sic] Services North America LLC v Department of Treasury, No. 264323. However, this amendatory act is not intended to affect a refund required by a

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[4] *DaimlerChrysler Services N.A., LLC v. Dep't of Treasury*, 477 Mich. 1043; 728 N.W.2d 228 (2007).

> final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired if the refund is payable without interest and after September 30, 2009 and before November 1, 2009. [Pet. App. 34-35.]

E. Proceedings in the Michigan courts.

Ford filed a complaint challenging the constitutionality of 2007 P.A. 105 in the Michigan Court of Claims ("trial court") on December 28, 2007. Both parties filed motions for summary disposition. On November 19, 2008, after considering the arguments, the trial court entered a nine-page order, in which it considered at length the parties' claims. Pet. App. 3-12. The trial court decided that Ford's interpretation of the statute was incorrect, and that its constitutional challenge to the statute lacked merit. The trial court therefore denied Ford's motion for summary disposition, and entered summary disposition for Treasury pursuant to Mich. Ct. Rule 2.116(C)(8). An order to this effect was entered on December 16, 2008.

Ford appealed this order to the Michigan Court of Appeals. This case was submitted for argument together with *GMAC, L.L.C. v. Dep't of Treasury*,[5] which was a virtually identical case in which General Motors advanced the same substantive argument as Ford. On December 3, 2009, the Michigan Court of Appeals affirmed the lower court's holding in this case. Its decision incorporated by reference its opinion in

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[5] *GMAC, L.L.C. v. Dep't of Treasury*, 286 Mich. App. 365; 781 N.W.2d 310 (2009).

GMAC, L.L.C. v. Dep't of Treasury. Pet. App. 1-2 (*Ford* decision); 25-44 (*GMAC* decision)

The Michigan Court of Appeals found no merit to GMAC and Ford's claims that 2007 P.A. 105 violated constitutional rights and ran afoul of the criteria of *Carlton* for when tax law may be changed retroactively. Rather, the court held that the statutory amendment corrected the court's own prior misinterpretation of the statute, and therefore did not decide the case on the basis of retroactivity.

The Michigan Court of Appeals also rejected several statutory interpretation arguments designed to indicate that Ford was entitled to the credit even if the statute were upheld. Ford has not presented these issues in its certiorari petition. Ford then asked the Michigan Supreme Court to grant leave for it to appeal the case, but the Michigan Supreme Court denied leave. Pet. App. 13-14.[6]

Ford now asks this Court to issue a writ of certiorari in this case, and to reverse the decision of the Michigan Court of Appeals that decided the case on Michigan State law grounds. For the reasons set out in this brief, Ford's petition should be denied.

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[6] *Ford Motor Credit Co. v. Dep't of Treasury*, 486 Mich. 962; 782 N.W.2d 771 (2010).

REASONS FOR DENYING THE PETITION

The issue in this case is whether Michigan's Legislature is authorized by Michigan law to correct a Michigan court's misinterpretation of a Michigan statute. This issue is strictly a matter of State law, and, therefore does not present a federal question that is within the jurisdiction of this Court.

Moreover, the unique factual circumstances of this case – in which Ford was not asked to pay additional taxes but instead retroactively seeks a refund – would make this a poor vehicle for considering the issue of retroactive changes in tax law.

Finally, even if the statute here was deemed to be a retroactive change in tax law, it satisfies the *Carlton* test for such statutes.

I. Ford is seeking review of a State law question that is not within this Court's jurisdiction to review.

The Michigan Court of Appeals found that the issue in this case is not a retroactive application of a statutory amendment, but rather the Legislature's correction of a judicial misinterpretation of a statute. Ford's attempt to brush this key distinction aside in footnote 2 to its certiorari petition is unavailing. Pet. 14-15. In the *GMAC* opinion, which was incorporated in the decision here, the Michigan Court of Appeals stated that *Carlton* was inapposite because it was examining here a legislative correction to the prior judicial interpretation, not a correction to the statute itself:

> [P]laintiffs' reliance on the *Carlton* decision is misplaced. Plaintiffs are not challenging the retroactive amendment to MCL 205.54i; rather, plaintiffs are challenging the Legislature's disapproval and corrective action with regard to the *DaimlerChrysler* decision. Indeed, in their brief on appeal, plaintiffs acknowledge that the prior version of MCL 205.54i was not the impetus for this lawsuit, but rather, "[plaintiffs] filed their sales tax refund claims based on the Court of Appeals' 2006 decision in DaimlerChrysler[.]" *However, it is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation.* [Pet. App. 43 (emphasis added; citations omitted).][7]

The key component of the decision of the Michigan Court of Appeals pertains to the Michigan Legislature's authority to do what it did here. In acknowledging that this was the "province" of the Legislature to amend the statute "to obviate a judicial interpretation," the court ruled regarding the

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[7] *GMAC*, 286 Mich. App. at 380781; N.W. 2d at 320. Earlier in the *GMAC* decision, the Michigan Court of Appeals determined that GMAC had no "vested" rights to a continuation of the tax law in examining whether any retroactive application of the amended version violated due process. Pet. App. 39-40. But this is only one of the *Carlton* factors, *Carlton*, 512 U.S. at 33-34, a subsidiary point, and the Michigan Court of Appeals went on to explain that *Carlton* was inapplicable. Thus, insofar as this analysis of the vesting of GMAC's rights is relevant to *Carlton*, it is obiter dictum because it is not the controlling analysis.

controlling construction of the statute – the Legislature may reject a judicial interpretation of a statute and restore the correct interpretation. This is a question of Michigan law, as a matter of statutory construction. Thus, the Michigan Court of Appeals found that the issue of whether a statutory amendment could be retroactively applied did not arise since the amendment was not a retroactive change in law but rather was a clarification of an existing law. The import was that Michigan law had not changed.

The question whether Michigan law gives the last word as to the meaning of a statute to the Michigan Legislature or to the courts was disputed in the appellate litigation of this case in Michigan. But the Michigan courts ruled in favor the State of Michigan on that question. It does not present a federal question appropriate for review by this Court. The Michigan courts have made it clear that this is how authority to interpret statutes is distributed in Michigan.[8]

There is a critical distinction between a legislative correction to a statute and a correction to a judicial misinterpretation of a statute. This Court in *Carlton* was examining a statutory provision that was a correction to "a mistake in the original 1986 provision."[9] The decision here was examining a correction to the judicial misinterpretation.

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[8] *Priest v. Canada Life Assur Co*, 179 Mich. App. 731, 735-737; 446 N.W.2d 352, 354-355 (1989); *Macomb County Prof Deputies Ass'n v. Macomb County*, 182 Mich. App. 724, 728-730; 452 N.W.2d 902, 903-905 (1990).

[9] *Carlton*, 512 U.S. at 32.

The definition of "taxpayer" in Mich. Comp. Laws § 205.54i(1)(e) was substantially consistent with the proper construction of the prior statutory scheme as well as with Treasury's longstanding interpretation of who was eligible to claim this deduction under § 205.54i. Under Michigan jurisprudence, "the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons."[10] In keeping with its original intent and consistent with Treasury's longstanding application, the Legislature corrected the Michigan Court's misinterpretation. In this case, the "taxpayer" is the person who must pay tax on the vehicle sale – the retailer. It is well-established in Michigan law that the sales tax is a tax on the privilege of engaging in retail sales in the State.[11] Only when the person has retail sales for which it is responsible to remit a sales-tax-payment can the bad-debt deduction be sought from gross proceeds.[12] Gross proceeds arise from a sale at retail.[13] Here, the retailer engaged in retail sales is the dealer – not Ford.

The Michigan courts have recognized the authority of the Legislature to engage in these corrections – they operate as a "legislative interpretation of the original act rather than a

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[10] *SBC Mich. v. PSC (In re Complaint of Rovas)*, 482 Mich. 90, 103; 754 N.W.2d 259, 267 (2008), quoting *Boyer-Campbell v. Fry*, 271 Mich. 282, 296-297; 260 N.W. 165, 170 (1935)(internal quotes omitted).

[11] *Nat'l Bank of Detroit v. Dep't of Revenue*, 334 Mich. 132, 140; 54 N.W.2d 278, 282 (1952).

[12] Mich. Comp. Laws § 205.54i(2).

[13] Mich. Comp. Laws § 205.51(1)(i).

substantial change of it."[14] The U.S. Court of Appeals for the Sixth Circuit also has recognized this aspect of Michigan law previously.[15] Of course, courts are the arbiters of the constitutionality of statutes, but this does not affect judicial deference to the Legislature's right to have constitutional statutes that it enacts interpreted as the Legislature intends.

Ford asserts in its petition that the Michigan Court of Appeals in *GMAC* "held" that the statute's retroactive application met the requirement of due process. Pet. 3, 14. This is a misunderstanding of the decision in *GMAC*. The Michigan Court of Appeals specifically stated that the argument of the retroactive application of the amendment was not raised in *GMAC* and did not resolve it. Pet. App. 43 ("Plaintiffs are not challenging the retroactive amendment to MCL 205.54i"). The Michigan Court of Appeals did not

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[14] *People v. Berg*, 85 Mich. App. 639, 645; 272 N.W.2d 167, 169 (1978), citing *Harper v. Progressive Casualty Ins. Co.*, 79 Mich. App. 764; 263 N.W.2d 1 (1977). *See also Detroit Edison Co. v. Department of Revenue*, 320 Mich. 506, 520; 31 N.W.2d 809, 816 (Mich. 1948)("If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act – a formal change – rebutting the presumption of substantial change"), quoting 1 Sutherland Statutory Construction (3d Ed. 1943), p. 418, § 1931 (internal quotes omitted).

[15] *See, e.g., In re Oswalt*, 444 F.3d 524, 528-529 (6th Cir. 2006)(holding that the Michigan Legislature's amendment to the Michigan Mobile Home Commission Act governed the attachment of a security interest even though enacted after the rights in the bankruptcy estate accrued because the amendment "clarified the legislature's intent that creditors have the option of perfecting their security interests by the recording of traditional mortgage liens.").

decide the issue of retroactive application because it resolved the question as a matter of statutory construction. For this reason, the Michigan Court of Appeals could rely on the same analysis in *Ford*. The resolution of the issue did not require a due process analysis.

This understanding of Michigan law – as to which the Michigan court is the final arbiter – is consistent with previous decisions of this Court.[16] In *Erie R.R. v. Tompkins*, this Court held that "whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."[17] Moreover, this Court has repeatedly recognized the authority of a State to distribute its functions of government among the various branches as it sees fit, and not necessarily according to an inflexible federal model.[18]

While Ford may disagree with the decision of the Michigan Court of Appeals regarding the meaning of the Michigan statute, the question remains one of Michigan law. Therefore, it is a question that is to be decided by Michigan courts, not by the federal courts.

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[16] *Erie R.R. v. Tompkins*, 304 U.S. 64, 77 (1938).

[17] *Erie*, 304 U.S. at 78.

[18] *Uphaus v. Wyman*, 360 U.S. 72, 77 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 256-57 (1957)(Frankfurter, J., concurring in result); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612-13 (1937) (Cardozo, J.) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). *See also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)(Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign").

As this Court has said many times, "This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision."[19] Such is the case here.

II. The peculiar factual circumstances of this case would make this case a poor vehicle for considering retroactive changes to tax law.

As already noted, the Michigan Court of Appeals did not decide the question raised by Ford in its petition for certiorari. Having decided that the issue presented was not a retroactive change to tax law, but rather a curative action by the Legislature as to the meaning of an existing statute, it did not decide the issue of retroactivity, and any discussion in the opinion of vested rights and retroactivity is obiter dictum. This fact alone makes this case an unsuitable one for this Court to revisit the issue of retroactive tax statutes.

Even if this case was about retroactivity, it would not present a situation in which Ford faced the classic type of retroactive change in tax treatment that is typical of retroactivity cases. The State of Michigan never demanded that Ford pay more taxes for past tax years. Rather, it was Ford – which had already filed its tax returns and paid its taxes consistent with the State's understanding of the statute – that sought to change the tax treatment it had claimed for itself in

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[19] *Harris v. Reed*, 489 U.S. 255, 260 (1989).

past years. Moreover, this situation is easily distinguished from all of the cases relied on by Ford, some of which do not deal with a tax question at all, and none of which deals with a situation where a taxpayer is retroactively seeking a refund based on its belief that an incorrect court ruling changed its tax liability.

Thus, the facts of this case do not present the circumstance in which a taxpayer relies on the statutory language only to have a legislature change the language of the act after the tax payer has relied on the original language to its detriment.

III. Even if this Court were to determine that there was a retroactive change in the Michigan tax law, any such change is not contrary to this Court's decision in *Carlton*.

Even if the statute here was deemed to be a retroactive change in tax law, the decision satisfies the *Carlton* test for such statutes.

Ford's arguments about retroactivity miss the mark. This is because Ford misapprehends the rationale of this Court's cases and compounds that error by discounting the underlying facts behind the dispute over the retroactive amendment to Mich. Comp. Laws § 205.54i.

In its 2006 *DaimlerChrysler* decision, the Michigan Court of Appeals changed a longstanding interpretation of the bad-debt deduction in § 205.54i, a statute originally enacted in 1933. If that

misinterpretation of the bad-debt deduction was not immediately corrected, this error would have caused an unanticipated $100,000,000 shortfall in an already tenuous State budget.[20] Thus, when the Michigan Legislature amended the statute to restore the original meaning of the legislation, the Legislature had a legitimate, rational basis for a statutory amendment.

There also was no detrimental reliance here. Ford seeks deductions for tax periods extending back to April 1, 2002. If it had already received these deductions, and the State was asking Ford to repay the deductions, perhaps Ford could claim that its settled-expectations were being disturbed. But this is not what happened.

During the time period in question, Ford never sought a bad-debt deduction. It filed the claim for the tax periods at issue, spanning the period between April 1, 2002 and December 28, 2007, for the most part after the tax periods had ended, and after the initial *DaimlerChrysler* decision indicated to Ford that it might be entitled to a deduction to which it did not previously seek a claim.[21] From the time it filed the claim, Ford was fully aware that the State was contesting the propriety of the judicial interpretation allowing the deduction, and that legislative action was

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[20] *See* Legislative Analysis, Sales and Use Taxes: Bad Debt Deduction, State of Michigan's brief in the Michigan Court of Appeals in *Ford*, filed March 6, 2009, Exhibit 2.

[21] Ford's claim for October 1, 2007, through December 28, 2007, was filed on December 28, 2007. This was after the curative amendment was enacted. Therefore, the question of retroactive application of the statutory amendment does not apply to this time period.

being contemplated to overrule the interpretation if it was not overruled by the courts.

In short, Ford does not face new tax liabilities that it will have to pay long after the periods in which the liabilities arose have ended. It does not even face the loss of a deduction to which it previously believed it was entitled. All it faces is the loss of a deduction it did not think it was entitled to prior to the *DaimlerChrysler* decision.

The period of retroactivity is also modest here. Contrary to Petitioner's claim that there was "no limit" to the amendment's retroactivity, Pet. 14, the amendment's correction was limited in nature because it does not affect final orders for which the rights of appeal have expired. Petitioner fails to address the limiting language placed in the amendatory language: "this amendatory act is not intended to affect a refund required by a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired . . . ." Pet. App. 34-35.

In examining the factors under *Carlton*, there was no violation of Ford's rights under due process.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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